4. It renders one of the most important conveniences of modern life susceptible at any moment of being used as an instrument of infinite mischiefs in the community. It is not necessary to enumerate these mischiefs. Any one can picture to his own mind what would be the condition of things in any neighborhood, if its whole correspondence were exposed to the public gaze. A single instance, in which the veil of confidential secrecy is thrust aside, will introduce some of these evils, but it will suggest the possibility that any moment all the others may follow.

T. M. C.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THOMAS SNELL ET AL. *v.* THE ATLANTIC FIRE AND MARINE INSURANCE COMPANY.

Courts of equity have jurisdiction to relieve against mutual mistakes of the parties in the execution of written contracts, so as to make them conform to the real intention of the parties.

Such mistakes may be shown by parol evidence, but in all such cases parol evidence is to be received with great caution: and, where the mistake is denied, should never be made the foundation of a decree variant from the written contract, except it be of the clearest and most satisfactory character.

It is a general rule, that a mere mistake of law, stripped of all other circumstances, is not a ground for reforming a written contract founded on such mistake.

When, however, the mistake has arisen from a misapprehension of a rule of law, unaccompanied by any negligence on the part of the party seeking relief, or any *laches* in discovering and alleging the mistake, and the denial of relief by reforming the contract would enable the other party to obtain an unconscionable advantage, a court of equity—the mistake being clearly proved—will reform the instrument. In all such cases, the court will lay hold of any additional circumstances, fully established, which will justify its interposition, and prevent marked injustice being done.

A policy was issued to a partner in his own name and so expressed as only to cover his individual interest in the property, but he had effected the insurance for his firm and accepted the policy on the assurance of the insurer's agent that the whole partnership interest was covered by it. *Held*, that the firm were entitled to have the policy reformed in equity.

A policy of insurance against loss by fire contained a provision that, "If the situation or circumstances affecting the risk thereupon [the property] shall be so altered or changed, either by change of occupancy in the premises insured or containing property insured, or from adjacent exposure, whereby the hazard is increased, and the assured fail to notify the company; or if the title to said property shall be in any way changed * * * in every such case the risk thereupon shall cease and determine, and the policy be null and void." The cotton insured was, at the time the insurance was taken out, guarded by Federal soldiers, and was

subsequently, but without lawful authority, seized under orders of Federal officials, who subsequently retained the exclusive control and custody thereof, and guarded the same till the time of the loss: *Held*, that such change of control and custody not increasing the hazard, nor affecting the owner's title to the cotton, he was under no obligation to inform the company thereof; and, that his failure to inform the company did not avoid the policy.

THIS was a suit in equity, instituted by Thomas Snell, Samuel L. Keith and Abner Taylor, partners under the firm-name of Snell, Taylor & Co., to reform a certain policy of insurance issued by the Atlantic Fire and Marine Insurance Company of Providence, and insuring Samuel L. Keith, from December 6th 1865, at noon, to January 7th 1866, at noon, against loss or damage by fire, in the sum of $8000, on 220 bales of cotton, described as "stored in open shed at West Point, Miss.; loss, if any, payable to Messrs. Keith, Snell & Taylor."

The material allegations in the bill were as follows: That said firm, on December 6th 1865, were the owners of 220 bales of cotton, worth more than $50,000, stored at West Point, Miss., awaiting transportation to some northern market; that Keith applied in behalf of his firm to Holmes & Bro., general insurance agents at Chicago, representing several companies, including the defendant in error, to procure insurance upon all the cotton, for the benefit of the firm, in the sum of $49,500, during such time as it remained at West Point, which time was uncertain, in view of the difficulties of transportation; that Holmes & Bro., the duly accredited and authorized agents, among others, of the defendant company, did agree with Keith, acting for and in behalf of his firm, to make, grant and secure insurance in the companies by them represented, on this cotton, in the sum of $49,500, while it was stored at West Point, and until shipped to a northern market, and to receive a premium of one per cent. on the total amount insured, to wit, $495, which sum Keith agreed to pay Holmes & Bro., provided the time for the insurance did not exceed one month, but to have a decreased rate if the time exceeded one month, the agreed rate to be paid by Keith when the cotton was removed from West Point, when the extent of the insurance could be definitely fixed; that on the 6th December 1865, Holmes & Bro., with intent to carry this agreement into effect, caused to be made several policies in different companies, among them the policy sued on, making an aggregate insurance of $49,500, and, after the loss occurred, notified Keith to pay, and he did pay, the sum of $495, the premium on the whole

amount insured, $80 of which was paid to and received by the defendant in error, for and on account of his firm, and in pursuance of the agreement with Holmes & Bro.; that the policy sued on remained in the possession of Holmes & Bro. until some time after the loss; that after the loss, and before any application to adjust the same was made, Holmes & Bro., with the intent to carry out the agreement that the cotton should be insured until its shipment from West Point, filled up the policy, so that by the terms thereof the insurance extended from December 6th 1865 until January 7th 1866, at noon; that Keith was assured by Holmes & Bro., when the insurance was taken, that it was not necessary that the policy should state in terms that the insurance was for, and on account of, Snell, Taylor & Co., and that the firm would be as fully protected, and the loss would be as promptly paid, as if the policy had expressly stated that the insurance was for and on its account; that, relying upon those assurances, and ignorant that, by the terms and legal effect of the terms employed, no other interest in the cotton was insured except his, Keith took the policy into his possession, in the full belief that it covered the entire interest of the firm; that soon thereafter, upon being advised to the contrary by his attorney, he demanded of the insurance agents that the policy be corrected so as to conform to the real contract and agreement, but Holmes & Bro. refused to correct or alter the same in any way.

The prayer of the bill was that the company be decreed and ordered to correct and reform the policy by inserting therein the stipulation that the insurance was made for the benefit or for the account of Snell, Taylor & Co., and that the firm have a decree for the sum so intended to be insured on the cotton.

The insurance company filed an answer, embracing certain grounds of defence, which sufficiently appear in the opinion.

The bill upon final hearing was dismissed, and from that final order this appeal is prosecuted.

The opinion of the court was delivered by

HARLAN, J.—1. We are satisfied that a valid contract of insurance was entered into, on the 6th December 1865, between Keith, representing Snell, Taylor & Co., and Holmes & Bro., representing the defendant and other insurance companies, and we entertain no serious doubt as to its terms or scope. Although there is some conflict in the testimony as to what occurred at the time the con-

tract was concluded, it is shown, to our entire satisfaction, not only that the agreed insurance covered the 220 bales of cotton, but that Holmes & Bro., with knowledge or information that the cotton was owned by Snell, Taylor & Co., and not by Keith individually, intended to insure, and, by direct statements, induced him to believe that they were giving insurance, in his name, upon the interest of the firm. He assented to the insurance being so taken in his name, because of the distinct representation and agreement that the interest of his firm in the cotton would be thereby fully protected against loss by fire so long as it remained at West Point. But according to the technical import of the words employed in the policy, which the company subsequently issued and delivered, only Keith's interest in the cotton is insured. Such is the construction which the company now insists should be put upon the policy in the event the court decides there was a binding contract of insurance. The fundamental inquiry, therefore, is whether Snell, Taylor & Co. are entitled to have the policy reformed so as to cover their interest.

We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. There was a definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, and this is demonstrated by legal and exact evidence, which removes all doubt as to the sense and understanding of the parties. In the attempt to embody the contract in a written agreement there has been a mutual mistake, caused chiefly by that contracting party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities. In *Simpson* v. *Vaughan*, 2 Atk. 33, Lord HARDWICKE said that a mistake was "a head of equity on which the court always relieves." In *Hankle* v. *Royal Exchange*, 1 Ves. Sr. 318, the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties. Lord HARDWICKE said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties,

on proper proof, that would be rectified." In *Gillespie* v. *Moon*, 2 Johns. Ch. 593, Chanc. KENT examined the question both upon principle and authority, and said: "I have looked into most if not all of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence." In the same case he said: "It appears to be the steady language of the English chancery for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing." And such is the settled law of this court: *Graves* v. *Boston Mar. Ins. Co.*, 2 Cranch 443; *Insurance* v. *Wilkinson*, 13 Wall. 231; *Bradford* v. *Union Bank*, 13 How. 66; *Hearne* v. *Marine Insurance Co.*, 20 Wall. 490, 496. It would be a serious defect in the jurisdiction of courts of equity if they did not have the power to grant relief against mutual mistakes or fraud in the execution of written instruments. Of course parol proof in all such cases is to be received with great caution, and where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement, after becoming aware of the mistake. Hence, in *Graves* v. *Boston Mar. Ins. Co.*, 2 Cranch 419, this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the plaintiff's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing. But no such state of case exists here. The policy in question was retained for Keith by the insurance agents. It was not surrendered to him, and he did not see it until after the loss had happened. Immediately upon being advised by his attorney that the policy as written did not cover the interest of the firm in the cotton, but only his individual interest, Keith promptly avowed the mistake, and asked that the policy be corrected in conformity with the original agreement. There was

no such acceptance by him of the written policy as would justify the inference that he had waived any rights existing under the original agreement, or had conceded that instrument to be a correct statement of the contract of insurance.

It may be said that the mistake made out was a mistake of law, and, therefore, not reformable in equity. It was said in *Hunt* v. *Rousmanier*, 1 Peters 15, to be the general rule that a mistake of law is not a ground for reforming a deed founded on such mistake, and that the exceptions to the rule were not only few in number, but had something peculiar in their character. The chief justice, however, was careful in that case to say that it was not the intention of the court "to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law." He said that he had found no case in the books, in which it has been decided that a plain and acknowledged mistake in law was beyond the reach of equity. In 1 Story's Eq. Jur., sec. 138, *e* and *f*, Redfield's edition, the author, after stating certain qualifications to be observed in granting relief upon the ground of mistake of law, says that "the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American." The same author says: "We trust the principle, that cases may and do occur where courts of equity feel compelled to grant relief, upon the mere ground of the misapprehension of a clear rule of law, which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mistake of law is presumptively no sufficient ground of equitable interference."

In the case under consideration the alleged mistake is proven to the entire satisfaction of the court. It is equally clear that the assent of Keith to the insurance being made in his name was superinduced by the representation of the company's agent, that insurance, in that form, would fully protect the interest of the firm in the cotton. Assuming, as we must from the evidence, that this representation was not made with any intention to mislead or entrap the assured, it is, however, evident that Keith relied upon that repre-

sentation, and, not unreasonably, relied also upon the larger experience and greater knowledge of the insurance agents in all matters concerning the proper mode of consummating, by written agreement, contracts of insurance according to the understanding of the parties. He trusted the insurance agents with the preparation of the written agreement, which should correctly express the meaning of the contracting parties. He is not chargeable with negligence because he rested in the belief that the policy would be prepared in conformity with the contract. As soon as he had a reasonable opportunity to consult counsel he discovered the mistake, and insisted upon the rights secured by the original agreement. A court of equity could not deny relief under such circumstances, without enabling the insurance company to obtain an unconscionable advantage through a mistake for which its agents were chiefly responsible. In all such cases, there being no laches on the part of the party in discovering and alleging the mistake, equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice being done: *Wheeler* v. *Smith*, 9 How. 82.

In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart, in any just sense, from the general and salutary rule that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts.

We have not overlooked, in this connection, that portion of the evidence which shows that Holmes & Bro., when advising the company by letter, of the contract of insurance, stated in a postscript that the insurance would be for a few days only. The officers of the company testify that they would not have permitted the contract to stand, but would have promptly cancelled the policy, had they not supposed the insurance would last but a few days. It was doubtless the belief of Keith, which he expressed to the insurance agents, that the cotton would remain at West Point for a few days only. The evidence shows that he had reasonable ground for such belief. But he seems to have guarded against disappointment in that respect by having it distinctly agreed that the insurance should last until transportation could be obtained, and the cotton shipped from West Point. That Holmes & Bro. so understood the agreement is evident from their letter of December 6th

1865, to the secretary of the defendant company, in which they state that they had taken insurance "on 220 bales of cotton stored in open shed at West Point, Miss., said cotton to remain insured from above date *till time of shipment.*" It is true that the response of the secretary shows that the company did not approve of such character of risks, but they did not repudiate the contract or require it to be cancelled, and only enjoined upon their agents "to decline such business in future." The act of the agents in filling up the blanks in the policy after the loss had occurred was manifestly in consummation of the original contract of insurance.

But independent of the issue in the pleadings, as to the mistake in reducing the contract to writing, the company defends the action and denies its liability, upon several grounds, which must now be considered.

2. The answer alleges that at the time, and prior to the alleged verbal contract of insurance, the cotton referred to in the bill was guarded, night and day, by soldiers of the United States, the shed in which the cotton was stored being occupied by such soldiers, who were in the habit of sleeping and eating their meals upon the cotton, and smoking and otherwise using fire upon and in its immediate vicinity; that those facts were material to the risk, and would, or might have influenced Holmes & Bro. and the company in taking the insurance, or in regard to the rate of premium to be charged, and that such facts, although well known to Keith when he applied for insurance, were not communicated by him to Holmes & Bro., or to the company, but were concealed, whereby the contract of insurance, whether reduced to writing correctly or not, became, and was void.

The evidence does not authorize a defence upon such grounds. The proof does not justify the belief that Keith, when applying for insurance, withheld any fact known to him and material to the risk. By the terms of the policy he was under an obligation to make a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same were known to him, and were material to the risk. The same clause of the policy provides that the risk shall cease, and the policy become null and void, "if any material fact or circumstance shall not have been fairly represented." This language must, of course, be construed in connection with the preceding words of the same clause. We find no

evidence in the record showing that Keith did not fairly represent every material fact known to him. Rawley, who was within hearing of the conversation between Keith and Edgar Holmes (the active manager of the business of Holmes & Bro.), says, that while he cannot recall the language used, he is "positive that Keith explained the character of the risk. * * * I know Keith described the character of the risk fully." When Keith applied to Edgar Holmes for the insurance, the latter asked him how the cotton was stored. He replied that it was "stored in an open shed." Holmes then said to him that he did not like the manner in which it was stored, and Keith replied: "The cotton was guarded day and night." Thus were Holmes & Bro. notified of its exact condition and situation. The information that the cotton was guarded day and night, indicated that there was something in the surrounding circumstances which made a guard necessary for its safety. Indeed, if it was to remain, while under insurance, in an open shed, and at a point remote from the company's place of business, it was clearly in the interest of the insurer to have it guarded day and night. But it is said that the habits of the guard were such, at the time of the insurance, as to endanger its safety. If this were clearly proven, the evidence furnishes no ground for imputing to Keith, or Snell, or Taylor, knowledge of any habitual carelessness or misconduct upon the part of the guard, which increased the danger of the cotton being burned.

3. The answer further alleges that on the 8th December 1865, whatever cotton there was in the shed at West Point, belonging to the complainants, was seized by the United States government, or by its officers, under its orders and direction, excluding complainants thereafter from all possession and control over the cotton, and that such seizure and exclusion from possession and control were maintained until the cotton was burned; that after such seizure the shed passed to the exclusive possession of soldiers of the United States, who were in the habit of using the same for military defence, of sleeping and eating therein, and of smoking and otherwise using fire upon and in its immediate vicinity; that at the time of the alleged verbal contract of insurance, large quantities of loose cotton were lying under the flooring of the shed, which consisted of loose boards, and immediately under the cotton stored in the shed, whereby the risk of fire was greatly increased; that these facts were, each and all of them, material to the risk, and would or

might have influenced the judgment of Holmes & Co. and of the company, in regard to the continuing thereof, or in regard to the rate of premium therefor; that these facts were known to Taylor on the 8th December 1865, and in ample time before the fire to have communicated the same, and sufficiently long before to have enabled the defendant to cancel the policy and give complainants ample notice thereof; that by reason of the concealment of these facts by Taylor from the company and its agents, the policy became and was wholly void.

This defence is doubtless based upon that clause which declares that "if the situation or circumstances affecting the risk thereupon (the property) shall be so altered and changed, either by change of occupancy in the premises insured, or containing property insured, or from adjacent exposure, whereby the hazard is increased, and the assured fail to notify the company, or if the title to said property shall be in any way changed, * * * in every such case the risk thereupon shall cease and determine, and the policy be null and void."

It will be observed that no alteration or change in the occupancy of the premises containing the insured property avoids the policy, in the absence of notice to the insurer, unless it be such alteration or change as increased the hazard. We have already seen that the company's agents were informed, when the contract was made, that the cotton was guarded by day and by night. There was no change in the character of the guard, except that prior to December 8th 1865, it was guarded by Federal soldiers, as a personal favor to Taylor, while after that date it was guarded by the same soldiers under an order from Federal officers for the seizure of the cotton. There is some evidence that the soldiers were, at times, negligent and careless, but we are not satisfied that their conduct in and about the property was such as to increase the hazard. The strong presumption is that, in view of the peculiar condition of public sentiment at West Point and its vicinity, against Taylor and others who had been officially connected with the seizure and collection of cotton, under treasury regulations, the presence of Federal soldiers largely decreased, rather than increased, the hazard, and was, therefore, for the benefit of all parties interested in its preservation. We attach no weight to its seizure, under orders of Federal officers, as, in and of itself, affecting the rights of the assured. It appears satisfactorily from the evidence that it had been purchased

by Taylor for the firm of which he was a member, and with money furnished for that purpose by the firm. It does not appear that any of the cotton claimed by him for the firm, did, in fact, belong to the United States, or that it had become forfeited to the United States by reason of his violation of the laws of the United States, or of treasury regulations made in pursuance of such laws. Nor does it appear that he caused or promoted its seizure by officers of the United States. So far as the record shows, it was an unauthorized seizure of the private property of the citizen, caused by the personal hostility towards Taylor of one who had himself been suspended from his position as a treasury cotton agent, through the influence or machinations, as he suspected or believed, of Taylor. If, as alleged, the cotton, upon its seizure, passed from the control of the owner to the exclusive possession and control, for the time, of Federal officers, such change of control and possession did not, by the terms of the policy, impose upon the insured the duty of communicating to the company the fact of such change. It was only when the change in the surrounding circumstances increased the hazard that the assured was, by the terms of the policy, under an obligation to inform the company thereof. If the seizure of the cotton had involved a change in the title to the property, then the company could have elected to avoid the policy, since it contains express stipulations to that effect. But, as already said, the record furnishes no evidence of any change in title, but only a change of possession and control, without the assent, and, perhaps, beyond the power of the owner to prevent, and which does not clearly appear to have increased the hazard.

4. We come now to the only remaining question which it seems necessary to consider, viz., the quantity of cotton in the shed, belonging to Snell, Taylor & Co., at the time of the fire. * * *

[Here the judge reviewed the evidence upon the question of fact, not of any general interest.]

The decree of the court below is reversed, with directions to enter a final decree in conformity with this opinion.

The general maxim that ignorance or mistake of the law is no excuse, either for a breach, or for an omission of duty, is well settled, both at law and in equity. The maxim does not, however, apply to the laws of another state or country, mistakes as to the laws of which stand upon the same footing as mistakes of fact: *Haven* v. *Foster*, 9 Pick. 130; *Kenny* v. *Clarkson*, 1 John. 385; *McCormick* v. *Garnett*, 5 DeG., M. & G. 278. It was said also, by Lord WESTBURY, in *Cooper* v. *Phibbs*, L. R. 2 H. L. 170, that the maxim applies only to the

general law of the country, and not to mere private right, *e. g.* title to property; and that private right of ownership is a matter of fact; a distinction which will be again referred to further on. Although, however, the authorities generally lay down the rule, that, where there has been a full knowledge of all the facts, equity will not relieve against mere mistakes in matters of law (1 Story's Eq. Jur. §§ 113, 116; Snell's Eq. (4th ed.) 428; Willard's Eq. Jur. *60), there are certain exceptional cases, and the true boundaries of the rule in equity seem involved in considerable doubt. The rule is laid down by Judge STORY (1 Eq. Jur. § 116), that "Agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held valid and obligatory;" "that a mistake of law is not ground for reforming a deed founded on such mistake. And, whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision." See, also, 1 Story's Eq. Jur. § 137; Willard's Eq. Jur. *60; *Hurd* v. *Hall*, 12 Wisc. 124; *Jordan* v. *Stevens*, 51 Me. 81.

The cases usually mentioned as exceptions are:

(1) Where a party has acted under a misconception as to, or ignorance of, his title to the property, respecting which some agreement has been made, or conveyance executed, as to which, so far as concerns mistakes of law, Judge STORY remarks: "That many, although not all of the cases, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief:" 1 Story's Eq. Jur. § 120. See, also, *Whelen's Appeal*, 70 Penn. St. 410, 427.

Under this head comes the doctrine, that, where a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his undisputed property to another, under the name of a compromise, equity will relieve him from the effects of his mistake: 1 Story's Eq. Jur. § 121; *Freeman* v. *Curtis*, 51 Me. 140. See also Willard's Eq. Jur. (Potter's ed.) *68; as to which Judge STORY'S explanation is, that, where the party acts upon the misapprehension that he has no title at all to the property, it seems to involve in some measure a mistake of fact of ownership, arising from a mistake of law; (see also *Cooper* v. *Phibbs*, *supra*; *Freeman* v. *Curtis*, *supra*); and that the case of a mistake of a plain and understood rule of property might well give rise to a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused, in which case the mistake of law is not the foundation of relief, but only the medium of proof to establish some other proper ground of relief: 1 Story's Eq. Jur. §§ 122, 128, 130; Snell's Eq. (4th ed.) 429. The first explanation seems unsatisfactory, and concerning it Judge REDFIELD has well said: (1 Story's Eq. Jur. (Redfield's ed.) § 130 note, § 138 *a*), that "the idea of there existing in this class of cases a mistake of fact as well as of law, might, perhaps with equal force apply to all cases of mistake of law. The true state of the law is always a fact. * * * * In regard to the law of the place of the forum, both the court and the parties are presumed to know it, and are bound to take notice of it. It is rather upon this ground, we apprehend, that courts of equity decline to interfere and grant relief upon the basis of alleged mistakes of the law of the forum, than because there is any inherent difference between

a *bona fide* misapprehension of law and of fact, or between the mistake of the law of the forum and that of a foreign state. * * * The distinction between mistakes of law and of fact, so far as equitable relief is concerned, is one of policy rather than principle." See *Jordan* v. *Stevens*, 51 Me. 80. It may also be observed of the first of Judge STORY'S explanations, above quoted, that, if allowed its proper latitude, it would, as it seems, annihilate all distinction between mistakes of law and of fact.

The cases upon this point have, also, been attempted to be reconciled upon the distinction, before alluded to, between the word *jus*, as used to indicate general law, and the same word as employed to denote private right, a mistake as to the general law being irremediable in equity, while a mistake in regard to individual rights may, it is said, under certain circumstances be redressed: *Cooper* v. *Phibbs*, *supra*; Bisp. Eq. (2d ed.) sect. 187. Whatever may be the explanation of the before stated doctrine as to compromises, the exception itself seems settled upon authority: *Naylor* v. *Winch*, 1 Sim. & Stu. 555; *Jones* v. *Munroe*, 32 Geo. 188; *Freeman* v. *Curtis*, *supra*; 1 Story's Eq. Jur. § 121.

(2) Another apparent exception is where, through ignorance or mistake of the law as to the proper mode of framing the instrument, there has been a defective execution of the intent of the parties, in which case equity will grant relief: 1 Story's Equity Jur. § 136; *Pitcher* v. *Hennessey*, 48 N. Y. 424; *Maher* v. *Hibernia Ins. Co.*, 67 Id. 283; *Sparks* v. *Pittman*, 51 Miss. 511; *Longhurst* v. *Star Ins. Co.*, 19 Iowa 364; *Pickett* v. *Merchants' Nat. Bank*, 32 Ark. 346; *Hunt* v. *Rousmaniere*, 1 Pet. 13; *Stover* v. *Poole*, 67 Me. 217, 223; *Adams* v. *Stevens*, 49 Id. 362; *Woodbury Savings Bank* v. *Charter Oak Ins. Co.*, 31 Conn. 517; *Oliver* v. *Mut. Com. Ins. Co.*, 2 Curt. C. C. 277; *Larkins* v. *Biddle*, 21 Ala. 252; *Evants* v. *Strode*, 11 Ohio 480; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290; *Beardsley* v. *Knight*, 10 Verm. 185; *Green* v. *Morris, &c., Railroad*, 12 N. J. Eq. 165; *Canedy* v. *Marcy*, 13 Gray 373; *Champlin* v. *Laytin*, 1 Edw. Ch. 467; s. c. 6 Paige 189; 18 Wend. 407. See, also, *Cockerell* v. *Cholmeley*, 1 Russ. & Myl. 418; *State* v. *Paup*, 13 Ark. 129.

Subject to the above exceptions, it may perhaps be considered as settled by authority that a mere mistake in matter of general law (as distinguished from private right), stripped of all other circumstances, is not ground for reforming a written contract founded on such mistake: 1 Story's Eq. Jur. (Redfield's ed.) §§ 113, 138–138*b*; *Bank of United States* v. *Daniel*, 12 Pet. 32, 55, 56; *Stover* v. *Poole*, 67 Me. 217; *Glenn* v. *Statler*, 42 Iowa 107. Judge STORY states (1 Equity Jur. § 138) that the present disposition of courts of equity is to narrow rather than to enlarge the operation of the exception. See, also, Snell's Eq. (4th ed.) 428, 429; 1 Story's Equity Jur. § 120; Willard's Eq. Jur. *60, 64. Judge REDFIELD seems to favor a more liberal view—though he is not very definite in stating the limits of the exceptions; see 1 Story's Eq. Jur. (Redfield's ed.) 138*a*–138 *l*—and sums up the principles applicable to mistakes in law by stating that "where the mistake is of so fundamental a nature that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, equity will interfere in its discretion to prevent intolerable injustice." See, also, *Stover* v. *Poole*, 67 Me. 217, 223. The above may probably be considered as definite a statement of the law upon the

subject as the present state of the authorities will warrant, the rule being as yet not entirely settled.

Courts of equity however, as stated in the principal case, will be vigilant to lay hold of any extraneous circumstances which will justify their interposition to prevent marked injustice being done: 1 Story's Eq. Jur. (Redfield's ed.) § 138 c, note; Bisp. Eq. (2d ed.) § 188. They will relieve against a mistake of law even when brought about by innocent misrepresentation. (See the cases cited at the end of this note.) And where a mistake is manifest, and it is doubtful whether it is a mistake of law or of fact, they will presume it to be a mistake of fact, until it is shown that all the facts were known: *Hurd* v. *Hall*, 12 Wis. 112, 131.

Returning to the principal case, it seems to be very clearly correct; for, as stated by the court, "The written agreement did not effect that which the parties intended," and had previously agreed upon; which would bring the case within the second class of cases above referred to. Moreover, the mistake was induced by the representation of the insurance agent that the policy as written would fully protect the interest of the firm; and, as we have seen, a mistake of law, caused by misrepresentation, though innocent, is a ground of equitable relief: see *Woodbury Savings Bank* v. *Charter Oak Ins. Co.*, 31 Conn. 517; *Longhurst* v. *Star Ins. Co.* 19 Iowa 364; *Jordan* v. *Stevens*, 51 Me. 78; *Freeman* v. *Curtis*, Id. 140; *Green* v. *Morris, &c. R. R.*, 12 N. J. Eq. 165.

MARSHALL D. EWELL.

Supreme Court of Michigan.

JOHN McEWEN *v.* CHARLES ZIMMER.

By a statute of the dominion of Canada, a judgment is permitted to be rendered against a person resident abroad, on a service made upon him out of the dominion. A citizen of Michigan was sued in Canada and service of process made in Michigan. He did not appear in the suit, and judgment was taken by default. Suit being brought on the judgment in Michigan, *Held*, that it was a nullity.

No sovereignty can subject persons not within its limits to the jurisdiction of its courts by constructive service, or by service made within the limits of another sovereignty.

THIS was an action upon a judgment purporting to have been rendered by the county court of county Essex, in the Province of Ontario, Dominion of Canada, in favor of McEwen against Zimmer. The only question which the record presented was one of jurisdiction in the county court of Essex to render the judgment, and this arose upon the service which was made upon the defendant. Zimmer was proceeded against as a non-resident under certain provisions of the statutes, known as the Consolidated Statutes of Upper Canada, by which upon a cause of action arising in Upper Canada a writ is allowed to be issued and served upon the defendant outside the jurisdiction of Canada, and upon such service the action may proceed to judgment.

Zimmer, it was conceded, was not a British subject, and the record of the judgment in the county court showed that the only service made upon him was made at the city of Detroit, in this state. It also showed that he did not, in any manner, respond to the service, and that judgment was taken against him by default. No property appeared to have been attached in the province, and no jurisdiction to render the judgment was claimed, unless the service in Detroit conferred it. The court below held that the judgment was a nullity.

The opinion of the court was delivered by

COOLEY, J.—The only question the record presents may be stated as follows: Whether it is competent for a foreign court to make service of its process in this state, and on the authority of such service to proceed to judgment against a party who refuses to recognise the jurisdiction.

We had not supposed, until this suit was brought to our attention, that such a jurisdiction could seriously be contended for. The rule laid down by Judge STORY in his Conflict of Laws has been supposed to be of universal acceptance, that "no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." Confl. of Laws, § 539. Mr. Wharton repeats this rule, as one not questioned: Confl. of Laws, § 712; and it is believed to have been recognised in every case arising in the courts of this country in which the exact point has been presented. If any case is an exception, it has escaped our attention.

It is urged, however, that the rule in Great Britain and the British provinces is otherwise, and that comity requires that we recognise and accept the rule of jurisdiction that prevails where the judgment was rendered. The obligations of international comity, we trust, will never be questioned in this state, especially when they are invoked in behalf of our neighbors of the Dominion, with whom our relations are so intimate, and it may be added, so friendly and cordial. We should certainly never have the assurance to demand from them more than we would freely and voluntarily concede to them. True comity is equality, we should demand nothing more and concede nothing less.

The English decisions having direct bearing on the question are not very numerous: *Douglas* v. *Forrest*, 4 Bing. 686, was an action in England upon a Scotch judgment, obtained without personal service, and after notice to the defendant by the process called "horning," which may or may not have ever come to his knowledge. The validity of the judgment was recognised, and the action sustained. But an inspection of the case and a reading of the opinion of Chief Justice BEST will disclose the fact that the rule, as laid down by Mr. Justice STORY, in his treatise on the Conflict of Laws, is in no manner assailed or questioned. The defendant was executor of a Scotch estate, and it was in that capacity that he was sued; and the jurisdiction was supported on the express ground that the estate was within the jurisdiction of the Scotch court, and that the defendant himself owed allegiance to that country. "To be sure," says the chief justice, "if attachments issued against persons who were never within the jurisdiction of the court issuing them could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts or obey its laws. We confine our judgment to a case where a party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given whilst the debtor resided in it."

In *Bequet* v. *McCarthy*, 2 B. &. Ad. 951, the judgment in question was rendered in one of the British colonies, and by the law of the colony, if the defendant was absent and could not be personally served, the service was permitted to be made on the king's attorney-general for the colony. It was so made in that case; the defendant, who was an official lately domiciled in the colony, being then absent. The substituted service was sustained as sufficient. It was made within the jurisdiction of the court, and the case is therefore not analogous to the present, and we have no occasion either to approve or question it. Our laws provide in some cases for a substitute for personal service where the party is within the jurisdiction or only temporarily absent, and where the substitute is such as with reasonable certainty will bring the proceeding to the

knowledge of the respondent, it is perhaps competent to give to such service the full effect of that made upon a person, but no such question is now before us.

In *Bank of Australasia* v. *Nias*, 16 Q. B. 717, the defendant, who was a stockholder in a joint stock company in New South Wales, was sued in England on a liability as such stockholder, which it was claimed was established by a judgment against the chairman of the company in New South Wales, under a statute which permitted the chairman to be sued as representative of the company. The statute was sustained, and the action was supported. Lord CAMPBELL, in his opinion, declares that the statute was passed for the benefit of the company, and that there was nothing at all repugnant to the law of England, or to the principles of natural justice, in enacting that actions upon contracts made by the company, instead of being brought individually against all the stockholders, should be brought against the chairman whom they had appointed to represent them. The case is treated as one in which the parties, by accepting the benefits of a statute, had consented to certain forms of procedure for which it provided.

A case more important to the present discussion is that of *Schibsby* v. *Westenholz*, Law Rep. 6 Q. B. 155. The action in that case was upon a French judgment, obtained without personal service of process, under a statute not differing essentially from the statute of Upper Canada, which is supposed to sustain the judgment now in question. The only difference of moment between that case and the present is that there the contract on which the French court gave judgment was an English contract, while in this case the judgment was given for services performed by the plaintiff in Canada, and possibly it may be claimed that the implied contract to pay for these services was a Canada contract, though the defendant was not in Canada at the time. Whether this difference has any legal significance will be considered further on. Putting this circumstance aside, the two cases are strictly analogous, and it is fortunate that, in passing upon the force that should be given to a Canadian judgment under the circumstances, we are afforded the light of a decision by one of the courts at Westminster on the very point in dispute.

It should be stated here that the statute of Upper Canada was a substantial reproduction in that province of the provisions of the

English Common Law Procedure Act (1852), which in terms permit judgment to be taken against persons out of the realm on a service of process made abroad. The case was therefore one in which it might be urged with great force that comity required that the courts in England should recognise the validity of judgments obtained in France upon a service precisely analogous to that which the English statute made sufficient to support a judgment in that country. BLACKBURN, J., in delivering the opinion of the court, proceeded to declare as the true principle on which the judgments of foreign tribunals are enforced in England, that stated by PARKE, B., in *Russell* v. *Smyth*, 9 M. & W. 819, and repeated in *Williams* v. *Jones*, 13 M. & W. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of England are bound to enforce, and that consequently anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action, proceeds to say: "We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act (1852), conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed; and we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident of Great Britain, under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down. Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if judgment being given against him in our courts, an action were brought upon it in the courts of the United States—where the law as to the enforcing foreign judgments is the same as our own—a further question would be opened, viz., not only whether the British legislature had given

the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognise, to submit to the jurisdiction thus created." And further on he says that the real question which the court of the United States must pass upon in the supposed case would be this: Can the island of Great Britain pass a law to bind the whole world? A question which he ventures to answer without hesitation in the negative.

But for a single remark in this opinion by Mr. Justice BLACKBURN, it should, as it seems to us, be accepted on all sides as covering completely the present case. The remark referred to is in the nature of a suggestion, that if at the time when the obligation was contracted the defendants were in a foreign country, but left it before the suit was instituted, perhaps the laws of the foreign country ought to bind them. The remark was not relevant to any facts then before the court, nor, in our opinion, does the present case require us to consider how far the suggestion has force. This defendant was not in Canada when the demand accrued, and in no manner has he submitted himself to its laws, unless he can be said to have done so in employing the services of the plaintiff in that country. If we might assume, which we cannot under the circumstances, that the supposed contract was a Canada contract, it is not by any means clear to our minds that the fact should affect the decision. If the obligation on the courts of one country to enforce the judgments of another be grounded in comity, it ought to appear that under corresponding circumstances it would be expected in this state that the courts of Canada would enforce a judgment given in Michigan on a Michigan contract against a resident of Canada, who was never served with process, except in the Dominion. So far is it from being the fact that such an expectation would exist, that the courts of this state are not permitted, by virtue of any statute or of any principles supposed to be derived from the common law, to render any such judgment; and should it by inadvertence, or by mistake of law, be entered up by any court of this state, any other court, and indeed the party defendant, might treat it, so far as it assumes to establish a personal demand against him, as an absolute nullity. No better illustration of the views held by our own courts upon this subject can be instanced than the case of foreclosure suits in equity against non-resident mortgagors where, although the case may proceed to decree on notice given by publication, or personally served in a foreign jurisdiction, yet the notice

is never accepted as the full substitute for service of process within the state, and though the case goes to a decree for the sale of the land, a personal decree against the party liable for the mortgage debt is never permitted to be taken upon such notice: *Lawrence* v. *Fellows*, Walk. Ch. 468; *Outwhite* v. *Porter*, 13 Mich. 533; *Tyler* v. *Peatt*, 30 Mich. 63. We may then dismiss comity from consideration as constituting any basis for the enforcement of the judgment now before us. We should certainly, *mutatis mutandis*, not expect it to be enforced. And we may add that in the still more pointed case of the attachment of lands of a non-resident as the commencement of a suit to collect a debt, though the statute provides for the case proceeding to judgment against the defendant on proof of the statutory notice by publication, yet the judgment is not regarded as establishing a personal demand against the defendant, and we should neither expect it to be enforced as such abroad, nor enforce it ourselves. This is so well understood in this state that the point is never mooted.

On the other hand, if the obligation to enforce a foreign judgment is to be rested on the duty or obligation of the defendant to pay the sum for which the judgment was given, as Mr. Baron PARKE and Mr. Justice BLACKBURN suppose, then it is important to know from what such duty or obligation springs. It is certain that it cannot spring from the mere fact that some court has assumed to render a judgment, but the proceedings anterior to the judgment must have been such as fairly imposed upon the party sued the obligation to appear and make his defence to the demands set up, if any he have; and if, under the circumstances, he was fairly entitled to treat any notice of the suit which may have been given him as unwarranted, and to disregard it, then it seems plain that no obligation to recognise the conclusions of the court could possibly arise. The question, then, seems to be narrowed to this: whether the service of process beyond the jurisdiction of the court issuing it, can impose upon the party served the obligation to appear in the suit and make there his defence, if he has any? If this question must be answered in the affirmative as regards a judgment rendered in Canada, it must receive a like answer when it contemplates a judgment rendered on a like service in New Zealand, or in one of the colonial courts of the Dutch East Indies. The question, therefore, is not one to be disposed of on a consideration of merely how this defendant might be affected; but it sug-

gests the possible cases of citizens of this country proceeded against in the remotest borders of civilization, on claims which may or may not have a foundation in justice, but which become established claims by default in making answer to a suit upon them.

Now the service of process is for the purpose of notifying the defendant, and giving him a fair opportunity to defend. But the service of process in Michigan, which requires one to appear and answer to a demand in a foreign country would in general be of no value whatever, because a defence abroad would either be practically impossible, or would be so expensive as to exceed in cost the importance of the demand. It may therefore justly and emphatically be declared that such service would give no fair opportunity to defend, and consequently could not accomplish the purpose of process. Were the doctrine accepted which would permit it, it might reasonably be anticipated that fictitious claims would be asserted abroad against Americans, who, for business or pleasure, had visited foreign countries, and would become established claims by default in a defence which a party wrongfully charged could not afford to make. We think the doctrine has no foundation in reason, or in the principles of international law or international comity.

We refer, as supporting these general views; to *Bischoff* v. *Wetherall*, 9 Wall. 812, and *Wood* v. *Parsons*, 27 Mich. 159. Also to *People* v. *Dawell*, 25 Mich. 247, where the general subject received some attention.

We find no error in the judgment, and it must be affirmed with costs.

The same conclusion has been reached by the courts of many of the states, in the following cases, amongst others: *McVicker* v. *Budy*, 31 Me. 314; *Wood* v. *Watkinson*, 17 Conn. 500; *Woodward* v. *Tremure*, 6 Pick. (Mass.) 354; *Kane* v. *Cook*, 8 Cal. 449; *Rangley* v. *Webster*, 11 N. H. 299; *Winston* v. *Taylor*, 28 Mo. 82; *Jones* v. *Spencer*, 15 Wis. 583; *Price* v. *Hickock*, 39 Vt. 292; *Williams* v. *Preston*, 3 J. J. Marsh. 600; *Davidson* v. *Sharpe*, 6 Ired. L. 14; *Arndt* v. *Arndt*, 15 Ohio 83; *Whittier* v. *Wendell*, 7 N. H. 257; *Miller* v. *Miller*, 1 Bailey (S. C.) 242; *Zepp* v. *Hagar*, 70 Ill. 223; *Frothingham* v. *Barnes*, 9 R. I. 474.

The question of the validity and effect of foreign judgments, or those of a sister state, and the reason urged in their favor, was quite carefully and elaborately considered by Mr. Justice FIELD in the recent case of *Pennoyer* v. *Neff*, 95 U. S. (5 Otto) 714, his conclusions being perhaps fairly stated in a quotation taken by him from the opinion of Mr. Justice MILLER, in *Cooper* v. *Reynolds*, 10 Wall. 308, where, speaking of the effect of a judgment rendered in an action commenced by attachment against a non-resident, he says, "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains

liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant and no service of process on him the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of the proceeding, in this latter class of cases, is clearly evinced by two well established propositions: 1st, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit, No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained upon such a judgment in the same court or any other, nor can it be used as evidence in any other proceeding, not affecting the attached property; nor could the costs of that proceeding be collected out of any other property than that attached in the suit. 2d. The court, in such a suit, cannot proceed, unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

In that case, *Pennoyer* v. *Neff*, the action was to recover possession of lands held by defendant, under title acquired at a sale, on execution issued on a personal judgment rendered without personal service or appearance, but after service by publication in the manner prescribed by the laws of the state of Oregon. The defendant was not a resident of that state, but had property in the state subject to attachment or execution, the land in question. The law of Oregon permitted service by publication, "where the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action." The suit was not commenced by attachment, but the first step taken to subject the land to the payment or securing of the claim was the execution levy. It was claimed on the part of the execution purchaser that, under the clause of the statute above quoted, no proceeding in the nature of an attachment was necessary, but that the fact of defendants owning property in the state was sufficient to give the court jurisdiction, by substituted service, to render a personal judgment which could be enforced, at least, against such property. But the court held not: that the jurisdiction to inquire into the obligations of a non-resident at all is only incidental to the jurisdiction over the property; and until the court has obtained such jurisdiction over the property by some proceeding in the nature of an attachment, it could obtain none over the defendant.

The questions, which have most frequently been considered by the courts, arising upon foreign judgments, are those relating to the extent to which evidence may be received, explaining or contradicting the recitals of the judgment showing jurisdiction.

In *People* v. *Dawell*, 25 Mich. 247, cited by Judge COOLEY in his opinion, the record of a divorce granted by an Indiana court was under consideration, and it was proposed to show that the petition, which was recited to have been filed by the wife, was so filed by an attorney who had no authority from the wife to do so. The opinion of the court was upon the ground that the record of the judgment might be impeached by a showing that the wife had never been a resident of Indiana, and that the court could not, therefore, have had jurisdiction of the subject-matter of the action; but Judge CAMPBELL, in his dissenting opinion, discusses the question, more es-

pecially, of the right of a party to an action based upon a judgment rendered in another state, to show *dehors* the record that he was not a resident of that state, or within the jurisdiction of the court, and that an attorney who appeared for him was unauthorized. The following cases hold that he may do so: *Harrod* v. *Barretto*, 2 Hall (N. Y.) 302; *Aldrich* v. *Kinney*, 4 Conn. 380; *Shumway* v. *Stillman*, 6 Wend. 447; *Hall* v. *Williams*, 6 Pick. 232; *Shelton* v. *Tiffin*, 6 How. 163; *Pennywit* v. *Foote*, 27 Ohio St. 600; *Sherrard* v. *Nevins*, 2 Ind. 241; *Pollard* v. *Baldwin*, 22 Iowa 328; *Norwood* v. *Cobb*, 15 Tex. 500; *Watson* v. *New England Bank*, 4 Metc. (Mass.) 343; *Houston* v. *Dunn*, 13 Tex. 476. For an expression of the opposite view, see *Wilcox* v. *Kassick*, 2 Mich. 165, and *Baker* v. *Struebraker*, 34 Mo. 172, following *Warren* v. *Turk*, 16 Id. 102.

E. A. C.

United States Circuit Court, Western District of Missouri.

BAKER v. THE KANSAS CITY TIMES CO.

In an action for libel, where defendant justifies a charge of crime, the defence must be established to the entire satisfaction of the jury, by which is meant that the evidence must produce an abiding conviction upon the minds of the jury of the truth of the charge; but the defence need not be established beyond a reasonable doubt, or with the certainty required to sustain an indictment.

In such a case the party charged with a crime is presumed to be innocent, and the burden of proof is on the plaintiff to establish the guilt of defendant, and where there are acts or statements of the defendant fairly admitting of two meanings, the jury should apply the meaning leading to innocence rather than guilt.

The truth of an alleged libel is, when established, a complete justification of the publication, and bar to the action.

But a party failing to establish his plea of justification, may show, in mitigation of damages, anything tending to establish that he acted without malice or bad intent, but from proper motives.

Absence of actual malice is no bar to an action of libel where the publication is not privileged. The malice implied by law is sufficient upon which to maintain the action, and this cannot be rebutted so as to defeat the action.

Where a plea of justification is not sustained, it is the duty of the jury to award damages to the plaintiff, but the amount thereof should be left to their discretion.

Semble, a party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as a principal, but by advising or commanding another to commit the crime.

THIS was an action for libel; plea justification. The facts sufficiently appear in the charge.

M. J. Leaming, *A. B. Jetmore* and *H. B. Johnson*, for plaintiff.

John K. Cravens and *John W. Wofford*, for defendant.

KREKEL, J., charged the jury as follows: During the year 1877, there were published in Topeka, in the state of Kansas, two newspapers, one called the *Commonwealth*, owned and controlled by Floyd P. Baker, the plaintiff in this suit, the other called the *Blade*, controlled by J. Clark Swayze. During the same year, 1877, two other newspapers were published, one in Leavenworth, in the state of Kansas, known as the *Leavenworth Times*, the other in Kansas City, in the state of Missouri, known as the *Kansas City Times*, published by the defendant in this suit. The paper issued by this corporation is under the management and control of Morrison Mumford, who has testified in the case. In the Sunday's issue of the *Kansas City Times*, of April 1st 1877, a communication appeared, dated Topeka, Kansas, March 29th 1877, signed M. C. M., in which reference is made to Baker, plaintiff in this action, as follows:

"The cloud of sorrow, caused by the felonious killing of J. Clark Swayze, has not yet passed away in this city; on the contrary, it thickens every hour, and the funeral of Mr. Swayze to-day, places a condemnation upon the villainous part which F. P. Baker took in the sacrifice of his life, seldom visited upon the acts of any man * * * It was undoubtedly the object of those who conspired against the life of Mr. Swayze—Baker in particular—to murder the *Blade* by killing its editor; but in this they have signally failed, as the numerous assurances on part of the business men of Topeka, that the paper should have their undivided support, will show. I am reliably informed that ten new names were handed into the office last evening as subscribers to the *Blade*, all of whom had previously taken the murderer's organ."

Of these two extracts, taken from, and a part of the correspondence, Baker, the plaintiff, complains and brings his action against the *Kansas City Times* for damages.

To this complaint the defendant, the *Kansas City Times*, answers by setting up, first, the facts and circumstances under which the publication was made; next, a justification, alleging "that said letter is true, for that the said F. P. Baker did, on the 28th day of March 1877, and for some considerable time prior thereto, encourage and countenance the said John W. Wilson, in hostile acts toward the said Swayze, and in assaults upon the said Swayze, by

the said Wilson, and so encouraged and supported by plaintiff said Wilson, did, on the 28th day of March 1877, kill the said Swayze."

It becomes unnecessary to examine whether these pleas are technically and formally correct, for they have been replied to and treated as substantially sufficient. As this plea of justification disposes of the case in favor of the defendant, if found to be true, it is proper that it should be taken up first.

You will have to ascertain, in the first place, whether the correspondence charges that Swayze was murdered—that is, killed by Wilson, deliberately and with malice aforethought, for it would not be murder if Wilson had killed Swayze in self-defence. Should you come to the conclusion that the correspondence does charge that Wilson murdered Swayze, it will become your duty, in the second place, to ascertain whether the charge is true. The defendant, the *Kansas City Times*, makes this allegation and is bound to prove it to your entire satisfaction. Now, for the purpose of ascertaining whether Wilson murdered Swayze, or acted in self-defence when he killed him, you will bring before your mind all the facts and circumstances testified to, existing prior to the killing, in order to arrive at the motives and intent with which Wilson went across the street and sought Swayze, as well as to ascertain the motives of Swayze in acting as he did. Wilson had a right to cross the street and remonstrate with Swayze against the publications in the *Blade*, and if that was the sole purpose with which he addressed Swayze, Wilson was in the right. But in trying to arrive at the intent of Wilson crossing the street and addressing Swayze, it will be proper for you to take into consideration the existing feeling and apprehensions of the parties, and if you shall find that Wilson calculated thereon as probably bringing about a personal difficulty—seeking rather than avoiding such—he, Wilson, being prepared, and intending, if such difficulty occurred, to make use of it for the purpose of killing Swayze, in such a case, Wilson cannot be said to have acted in self-defence, and the killing of Swayze would be murder. A party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life. Should you, after a careful examination and consideration of the facts and circumstances testified to and connected with the case, come to the conclusion that Wilson, when he killed Swayze, acted

in self-defence, then the defendant fails in making out his plea of justification, and you should find that issue for plaintiff. But if you shall find that Wilson did not act in self-defence in the killing of Swayze, then it becomes necessary for you to consider whether in the language of the plea of justification the plaintiff, Baker, encouraged, countenanced and supported Wilson in the murder of Swayze, so as to make him, Baker, accessory thereto.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as principal, but by advising or commanding another to commit the crime. You are therefore to determine from the testimony in the case whether Baker advised or commanded the murder of Swayze. The part of the answer setting up justification charges Baker with encouraging, countenancing, and supporting Wilson, terms of no well-defined legal signification when applied to a case such as the one before the court. I construe them to mean a legal justification, namely, the advising or commanding Wilson to murder Swayze. In trying to arrive at a conclusion as to whether Baker advised or commanded Wilson to murder Swayze, Baker is to be treated and considered by you as innocent of the crime of being accessory to the murder of Swayze by Wilson. The guilt of Baker must be shown by the defendant to your entire satisfaction, by which I here and elsewhere mean that the evidence in the case must produce an abiding conviction in your mind of the guilt of Baker.

You should with care go over all the testimony in the case, and if you find expressions used or acts done by plaintiff, Baker, fairly admitting of two meanings, you are authorized to apply the meaning leading to innocence rather than guilt. In passing from this plea of justification I sum up as follows:

First, ascertain from the correspondence complained of whether it intends to charge that Wilson murdered Swayze, and that Baker was accessory to the murder, and if you find that this is the case, you will next find whether Wilson did murder Swayze, or did the killing in self-defence. If you find that Wilson acted in self-defence, that ends the plea of justification, for there could be no murder when the killing was done in self-defence.

If you shall find that Wilson did not kill Swayze in self-defence, but committed a murder, you will next find whether Baker was accessory thereto, by advising or commanding the same. If you

shall find that Baker was not accessory to the murder, such finding will end the plea of justification in favor of plaintiff.

If you shall find that Wilson murdered Swayze, and you shall further find that Baker was accessory to the murder of Swayze, such finding establishes the plea of justification, ends the case, and you should find for defendant.

Turning from the plea of justification to the plea in mitigation pleaded by the defendant, I proceed to present the law regarding it, so that you may have the whole case before you.

The law, proceeding upon the presumption of innocence, assumes when a crime is charged upon any one that he is innocent thereof, and presumes the charge to have been maliciously made. The author or publisher is permitted, as already explained, to show that the charge made is really true, and that the person charged is or has been guilty of the crime imputed to him. Upon sustaining the charge, the one making it is acquitted and stands justified, that is if he sustain his plea of justification.

But if he fails to sustain his plea of justification, the author or publisher may show, in mitigation of damages, anything tending to establish that he acted without malice and bad intent, but from proper motives.

In cases such as the one under consideration the law will not allow the author or publisher to go free if he fails to establish his plea of justification, though he satisfy you of the purity of his motives and the greatest prudence and care in making the publication. The law requires publishers not only to be satisfied of the truth of the charges he publishes, but he must also be able to establish them to the satisfaction of a jury, in case he is sued. If the plea of justification pleaded in this case has not been made out by the defendant, it will then be necessary for you to examine into the mitigating circumstances in evidence, so as to enable you to determine the good faith, prudence and caution exercised by the defendant in making the publication, as upon this, in a large measure, must depend the amount of damages which you may assess against the defendant. You will call to mind the undisputed fact that the correspondent, Morris, was not connected with the *Kansas City Times*, and determine whether more or less care should be required at their hands when receiving a correspondence from a stranger. The manner in which the correspondence was received, the gravity of the charge and the action of the conductor of the *Times*, in refusing

or neglecting to retract the charges made in the communication, when his attention was called to it by the plaintiff, are proper for your consideration, as is also the duty which the conductor of a newspaper such as the *Times* owes to the public, as well as the legal obligation which he is under to the plaintiff. You are to guard, on the one hand, the right of plaintiff, and on the other the freedom of the press, which is measurably involved in cases of this kind. There is no claim for special damages made by plaintiff, and none has been proven. While it is your duty, in case the plea of justification has not been made out, to find damages against this defendant, the amount thereof is left to your discretion, which you will exercise with due regard to the parties.

I. The court instructed the jury that "while it is your duty, in case the plea of justification has not been made out, to find damages against the defendant, the amount thereof is left to your discretion, which you will exercise with due regard to the rights of both parties." It is submitted that the court should have laid down definite rules by which damages should have been measured. In *True* v. *Plumley*, 36 Maine 466, the court, at the Nisi Prius trial, had instructed the jury as follows: "As to damages, you will consider the pain and anguish occasioned by defendant's slander, the cost and trouble, the suffering occasioned by that slander, her prospects in life as affected thereby, the wealth and position of the defendant, and his power therefrom to injure, and give such damages as she is entitled to;" and APPLETON, J., speaking for the full Supreme Court, after reviewing the authorities in regard to the proper rules by which to assess damages in this class of cases, says: "Whatever rule may be the true one, the plaintiffs are entitled to such damages as upon the evidence can be awarded in conformity therewith, and not to damages assessed upon other erroneous principles. Now, no rule was given to the jury. Are they, then, to be a law unto themselves and, freed from all legal restraints, to assess damages at their own will and pleasure? The jury were directed to give the plaintiffs the damages to which they were entitled. To what are the plaintiffs entitled? The question unanswered recurs. To damages which are simply compensatory, and to the full extent of any injury sustained? To those which would, by way of example, be sufficient to deter others, or to such as, beside compensating and deterring others by example, may impose a punishment on the defendant as for a crime, thus infusing into the civil proceedings the effect of a criminal procedure, and erecting the jury into a tribunal which shall in each case impose the penalty? Either of these principles might have been adopted by the jury. Which, in fact, they did adopt we know not and cannot know. As was remarked by ROGERS, J., in *Rose* v. *Story*, 1 Barr 190, where somewhat similar instructions were given, 'this is giving them discretionary powers without stint or limit, highly dangerous to the rights of the defendant. It is leaving them without any rule whatever.' Most of the various matters referred to in this instruction might be regarded as elements proper for the consideration of the jury; but still some rule should have been given to the jury, unless the law is that they are to determine the damages without

any restraints, and in each case according to their arbitrary discretion. * * * A new trial must therefore be granted."

An able writer, in a recent work, lays down the rule respecting the duty of the court to instruct the jury as to the rules by which they are to be governed in arriving at the damages to be given, as follows: "The amount of damages is to be determined by the jury, but the court should instruct them as to the rules by which they should be governed in fixing the amount. A general instruction to find such damages as, under all the circumstances, they thought right, was held to be improper:" Townshend on Slander and Libel, § 289. There is no possible distinction between the instructions condemned by these authorities and the one given by the court in this case. The law is clear and conclusive that some fixed rules should have been laid down for the ascertainment of damages: Sedg. Meas. Dam., 6th ed., 771.

The court should have directed the jury, even though there was no evidence of malice, to give compensatory damages, which would include the cost and trouble of disproving the libel: *Armstrong* v. *Pierson*, 8 Iowa 29; Townshend on Slander and Libel, § 289. The court should also have instructed the jury to give such damages as would compensate plaintiff for all the mental suffering which would naturally be caused by such a publication: Sedg. Meas. Dam. 674; *Swift* v. *Dickerman*, 31 Conn. 285; *Miller* v. *Roy*, 10 La. Ann. 231; *Dufort* v. *Abadie*, 23 Id. 280; *Fry* v. *Bennett*, 4 Duer 247. In addition to this, the court should have instructed the jury that if the publication of the article complained of was attended with circumstances of oppression, negligence or malice, they should give exemplary damages, not only to compensate the plaintiff, but to punish the offender: *Buckley* v. *Knapp*, 48 Mo. 152; *Clements* v. *Malony*, 55 Id. 352; *Snyder* v. *Fulton*, 34 Md. 128; *Sanderson* v. *Caldwell*, 45 N. Y. 398.

II. The court instructed the jury that "A party under reasonable apprehension of danger of life or great bodily harm, has a right, in self-defence, to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life." It is submitted that the true rule had just been stated by the court, but this proposition stood as a distinct and independent one. The principle is well settled that one person cannot attack another, and then rely upon the danger thus brought upon himself by a resistance of that attack to justify taking life: *State* v. *Starr*, 38 Mo. 270; *State* v. *Linney*, 52 Id. 40; *State* v. *Underwood*, 57 Id. 40; *State* v. *Brown*, 64 Id. 367. This principle, however, presupposes that the party bringing on the difficulty and finally taking life, has done some unlawful act, has had some criminal or unlawful agency in bringing the danger upon himself. But the instruction given in the principal case does not distinguish between lawful and unlawful agency. Wilson approached Swayze and spoke to him shortly preceding the killing. This was a lawful act. One theory was that he did this solely for the purpose of remonstrance against newspaper abuse, while another theory was that he intended to provoke Swayze to attack him and furnish a reason for homicide. In either case he had an "agency" in bringing about the danger he was placed in by Swayze's attack. The language of the court was therefore too broad, and had a tendency to mislead the jury.

III. The plea of justification was wholly insufficient. The justification must be as broad as the charge, and of the very charge: Town. Slan. and Lib., § 212; Folk. Stark. Slan. and Lib., § 692 and note 1; Id., § 694 and note 2; Id., § 701 and note 4. And where the charge is general, the plea

of justification must state the facts specifically to sustain the same, and where it is a charge of crime, the plea must specify the crime and show its commission with the same certainty as in an indictment. In other words, it is not sufficient to answer that the charge is true, but the facts which show the same to be true must be stated: Town. Slan. and Lib., §§ 355 and 358; Folk. Stark. Slan. and Lib., § 483 and notes 16 and 18; *Atteberry* v. *Powell*, 29 Mo. 429; *Smith* v. *Tribune Co.*, 4 Bliss 477; *Shepard* v. *Merrill*, 18 John. 475.

IV. The court instructed the jury that the plea of justification must be established by defendant "to your entire satisfaction, by which I here and elsewhere mean that the evidence in the case must produce an abiding conviction in your mind" of the truth of the charge, and declined to instruct that the offence charged must be proven beyond a reasonable doubt, or with the certainty required to sustain an indictment. This is a vexed and still unsettled question in the law. The authority of the text-writers, it is submitted, is against the rule laid down in the charge: 2 Greenl. Ev., § 426; Townshend on Slander, § 404. In some cases, where the defence is on the ground of fraud or crime on the part of the plaintiff, as in *Scott* v. *Home Ins. Co.*, 1 Dillon 105, where, in an action on a policy of insurance, the defence was that plaintiff had set his own house on fire, it must be conceded that the weight of authority is in favor of the rule in civil, and not that in criminal, cases. But these authorities do not apply to a case of libel. See, however, the authorities collected and the subject ably discussed in the note to *Kane* v. *Hibernia Ins. Co.*, 17 Am. Law Reg. N. S. 302.

H. B. JOHNSON.

Supreme Court of Mississippi.

SCHMIDLAPP ET AL. v. S. D. CURRIE ET AL.

One partner cannot convey firm assets in satisfaction of a private debt, to the exclusion of firm creditors, without the assent of his co-partners.

He may do so, however, if the entire firm participate in the assignment. This, of course, where there is no fraud.

The lien of a firm creditor on firm assets is not superior to that of an ordinary creditor upon the property of an individual debtor.

The doctrine of the primary application of firm assets to firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts when called upon to wind up the firm business, and they find no valid change or disposition of the assets has been previously made by the members; but the principle itself springs out of the obligation to do justice between the partners.

THE case is fully stated in the opinion.

The opinion of the court was delivered by

CHALMERS, J.—Harvey & Washington were partners in a liquor saloon, the former having contributed the capital and the latter his services. Harvey having become indebted to Odeneal, transferred to him, in part payment of the indebtedness, and with the knowledge

and consent of Washington, the entire business and stock of the partnership. Odeneal subsequently took in Currie as a partner, and the business was continued under the style of S. D. Currie & Co. The debt of Harvey to Odeneal, which formed the consideration of the transfer, was the individual debt of Harvey, for which neither Washington nor the firm of Harvey & Washington, as a firm, were in any way responsible; but Washington assented to and acquiesced in the sale. After the sale, Schmidlapp & Brothers, creditors of the firm of Harvey & Washington, sued out a writ of attachment against them, and caused the same to be levied on their former goods, in the possession of S. D. Currie & Co., and upon the ground that the transfer of the firm goods, in satisfaction of the individual debt of one of the partners, was fraudulent and void as against firm creditors.

Is the principle assumed a sound one? Is it true that partnership assets cannot, by the act or consent of all the partners, be assigned in liquidation of the private debt of one of the members, so as thereby to defeat the claims of firm creditors? The authorities on the question are divided, and in Burns on Fraudulent Conveyances it is broadly stated that such conveyances are voluntary and void as to firm creditors, but it is doubtful from the cases cited, whether the author is alluding to transfers made by one partner alone, without the assent of his co-partners, or whether he embraces assignments participated in by the entire firm. If the former, the proposition is indisputable. If the latter, we think the sounder reasoning and the weight of authority are against him. We speak of cases like the present, where there is no pretence of actual fraud, and where there is no showing that the firm was at the time insolvent, though, according to some of the cases, the insolvency of the firm would not affect the result. The firm creditors at large, of a partnership, have no lien on its assets, any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property inherent in every partnership is as unlimited as that of an individual, and this *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner; namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own,

and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts, when from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon its assets. Thus, when upon a dissolution of the firm by death, or limitation, or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners. The only way to accomplish this is to so marshal the assets that property which was owned in common shall be applied to the joint debts, and that which was separately owned, shall be applied to the liabilities of the separate owner, so that neither class of creditors shall be allowed to trespass upon the fund belonging to the other until the claims of that other shall have been satisfied. This right of the creditors is therefore really the right of their debtors, and enures to them derivatively from the debtors. Hence, it is said the lien or *quasi* lien of the creditors "is worked out through the partners," the meaning of which is that the firm creditors may demand the primary application of the firm assets to the payment of their debts because each one of the partners would have a right to demand this as against his co-partners. It must follow, therefore, that if at a time when the firm was still in existence, where no legal liens of any sort have attached, where it was neither bankrupt nor contemplating bankruptcy, all the members have agreed to a particular disposition of its assets, and that disposition is neither colorable nor fraudulent, that is to say, is upon a bona fide consideration, and reserves no benefit to the grantees, inasmuch as none of the partners can be heard to complain of such disposition, so none of the creditors of the firm or of the individual members composing it can question or attack it.

Conceding, as all the authorities do, that the firm creditors have no independent right to demand to be first paid, but derive that right solely by, through, and under the right which the partners have to insist that this shall be done, it is impossible to see how the rule can be enforced where all the members of the firm have,

before the dissolution and without any ground to suspect fraud, given to the assets a different direction.

While some courts of high repute have taken a different view, we confess our inability to escape the logic of this proposition. The courts of New York, New Hampshire, Illinois, and perhaps other states, seem to have taken a different view of the question. In consonance with our view are the following, among other authorities: *Whitten* v. *Smith*, Freeman's Ch. R. 231; *Freeman* v. *Stewart*, 41 Miss. 139; *Carter* v. *Beavan*, 6 Jones' Law (N. C.) 44; *Rice* v. *Barnard*, 20 Vt. 479; *Nat. Bank* v. *Sprague*, 20 N. J. Eq. 14; *Allen* v. *Centre Valley Co.*, 21 Conn. 130; *Sigler* v. *Knox Co. Board*, 8 Ohio St. 511; *Ex parte Riffin*, 6 Vesey 119; *Campbell* v. *Mullett*, Swanst. Ch. 550.

Judgment affirmed.

Court of Appeals of New York.

SAMUEL BERTHOLF *v.* JAMES O'RIELLY.

The constitutionality of an act of the legislature is to be determined solely by its repugnancy to constitutional restraints or prohibitions. No violation of natural justice and equity is sufficient.

That a statute impairs the value of property, or interferes with its lawful use by imposing a liability for the consequences of a lawful act, does not make it unconstitutional. All property is held subject to the power of the state to regulate or control its use to secure the general safety and welfare.

It is no objection to the validity of a statute that it gives a right of action or imposes a liability unknown to the common law.

A statute making the owner of premises on which liquor is sold liable for all damages resulting from the intoxication of the persons purchasing the liquor, and this without reference to any negligence of the owner, or to the lawfulness or unlawfulness of his tenant's action, *held*, valid as a police regulation of the traffic in intoxicating liquors.

THIS was an action under a statute of April 29th 1873, commonly called the Civil Damage Act, and was brought by the plaintiff against the defendant as the landlord of hotel premises, let with knowledge that intoxicating liquors were to be sold thereon by the lessee, to recover the value of a horse owned by the plaintiff, which died in consequence of having been overdriven by the plaintiff's son while in a state of intoxication, produced in part by liquor sold him by the lessee at his bar on the leased premises. The essential facts, as established by the verdict, were as follows:

The defendant, when the act in question was passed, was the owner of a hotel building and premises. In June 1875, he leased them to one Firnhaber, knowing that the lessee intended to occupy the building for a hotel and boarding-house, and sell intoxicating liquors therein. The lessee entered into possession and opened a bar in the hotel, and with the defendant's knowledge commenced selling liquors therefrom. On Sunday, July 18th 1875, the plaintiff's son, who was residing with his father, informed him that he had some business with a person residing about four miles from the father's residence, and thereupon, with the plaintiff's knowledge, took his horse and buggy and drove away.

He did not go to the place where he informed the plaintiff he intended to go, but went to the village where Firnhaber's hotel was located, and to the hotel, and there purchased and drank whiskey several times at the bar, and then drove to a neighboring village and drank again, and returned to Firnhaber's, drinking again on his return. He became, in consequence of these repeated potations, intoxicated, was arrested for disorderly conduct in the streets, and after being detained in custody for a time was discharged, and in the evening started for home, and the horse, soon after it reached the plaintiff's house, died. The jury found that it died from overdriving by the plaintiff's son, and that his treatment of the horse was caused by his intoxication.

Firnhaber had no license to sell intoxicating liquors. It was understood between him and the defendant, when the lease was made, that a license was to be procured, and the defendant informed him that he would see that he had one. The plaintiff's son was of intemperate habits, and at one time had been an inmate of an inebriate asylum. The plaintiff recovered a verdict for the value of the horse.

William J. Gros, for the plaintiff.

Lewis E. Carr, for defendant.

The opinion of the court was delivered by

ANDREWS, J.—This and other cases which have been argued and are awaiting the decision of the court, present the question of the constitutionality of the "act to suppress intemperance, pauperism and crime," passed April 29th 1873, commonly known as the Civil Damage Act.

It cannot be disputed that the facts found bring the case within the terms of the statute, and authorize the recovery, if the law itself is valid.

The act gives to every husband, wife, parent, guardian, employer or other person "who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication" of any person, a right of action against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication, in whole or in part; and declares that "any person or persons owning or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold thereon, shall be liable, severally and jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages."

All the elements of the landlord's liability under the act exist in this case, viz: The leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant producing intoxication; and the act of the intoxicated person causing injury to the property of the plaintiff.

The question we are now to determine is, whether the legislature has the power to create a cause of action for damages in favor of a person injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon.

To realize the force of this inquiry it is to be observed that the leasing of premises for the sale of liquors thereon is a lawful act, not prohibited by this or any other statute. The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful; that is, whether it was authorized by the license law of the state, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling liquor. Although the person to whom the liquor is sold is at the time apparently a man of sober habits, and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out

that the liquor causes or contributes to the intoxication of the person to whom the sale or gift is made, under the influence of which he commits an injury to person or property, the seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability. The statute imposes upon the dealer and the landlord the risk of any injury which may be caused by the traffic. It cannot be denied that the liability sought to be imposed by the act is of a very sweeping character, and may, in many cases, entail severe pecuniary liabilities, and its language may include cases not within the real purpose of the enactment. The owner of a building who lets it to be occupied for the sale of general merchandise, including wines and liquors, may, under the act, be made liable for the acts of an intoxicated person, where his only fault is that he leased the premises for a general business, including the sale of intoxicating liquors, in the same way as other merchandise. The liability is not restricted to the results of intoxication from liquors sold or given away to be drunk on the premises of the seller.

There is no way by which the owner of real property can escape possible liability for the results of intoxication where he leases or permits the occupation of his premises, with the knowledge that the business of the sale of liquors is to be carried on on the premises, whether alone or in connection with other merchandise, or whether they are to be sold to be drunk on the premises or to be carried away and used elsewhere.

His only absolute protection against the liability imposed by the act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors.

The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the constitution, the question of its validity is at an end, and neither the executive nor judicial department of the government can refuse to recognise or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, and although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved. so far as we know, by any authoritative

adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or implied prohibition and restraints of the constitution; and it is unnecessary to seek for principles outside of the constitution under which such legislation may be condemned.

The main guaranty of private rights against unjust legislation is found in that memorable clause in the Bill of Rights, that no person shall "be deprived of life, liberty or property without due process of law." Const., art. 1, sect. 6. This guaranty is not construed in any narrow or technical sense. The right to life may be invaded without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement; and property may be taken without manual interference therewith, or its physical destruction.

The right to life includes the right of the individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties, and to follow a lawful vocation for the support of life; the right of property, the right to acquire, possess and enjoy it in any way consistent with the equal rights of others, and the just exactions and demands of the state.

The comprehensive scope of the guaranty of private property finds many illustrations in the judicial decisions in our state. The limit placed upon the power of taxation is an instance. The right of taxation is an attribute of sovereignty, without which governments would be powerless, and organized society could not exist, and it is said to be unlimited. But this is only true when it is exercised for a public purpose. The taking of private property for a private purpose, under the guise of taxation, is no less a violation of the constitution than if the property of A. was attempted to be transferred to B. by the mere force of a legislative mandate.

It is upon this principle that we have recently held in the case of *Weismer* v. *The Village of Douglass*, 64 N. Y. 92, that a law involving taxation in aid of a private enterprise and business was unconstitutional and void.

In *Wynehamer* v. *The People*, 13 N. Y. 378, the sanctity of private property, and the efficiency of constitutional guaranties for its protection, under whatever guise it is attempted to be assailed by legislation, was most ably and amply vindicated. The pro-

visions in the act then under consideration were held to deprive persons owning intoxicating liquors at the time of its passage, of their property, although their title might not be affected by the act, or the property itself, in its material substance, taken or destroyed. "There may," says MILLER, J., in *Pumpelly* v. *The Green Bay Co.*, 13 Wall. 177, "be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the constitution;" and this observation is warranted by the general tenor of judicial authority.

Admitting, as we do, the soundness of this interpretation, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the state, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the constitution.

There are two general grounds upon which the act in question is claimed to be unconstitutional: First. That it operates to restrain the lawful use of real property by the owner, inasmuch as it attaches to the particular use a liability, which substantially amounts to a prohibition of such use, and, as to the seller, imposes a pecuniary responsibility, which interferes with the traffic in intoxicating liquors, although the business is authorized by law. And, second. That it creates a right of action unknown to the common law, and subjects the property of one person to be taken in satisfaction of injuries suffered by another, remotely resulting from an act of the person charged, which act is neither negligent nor wrongful on his part, but which may be in all respects in conformity with law. The act, it is said, in effect authorizes the taking of private property without "due process of law," contrary to article one, section six, of the constitution, and is also a violation of the first section of the same article, which declares that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any of the citizens thereof, unless by the law of the land or the judgment of his peers." If the act is "due process of law," within the sixth section of the first

article, it is manifest that it is valid within the other section to which reference is made.

The right of the state to regulate the traffic in intoxicating liquors within its limits has been exercised from the foundation of the government, and is not open to question. The state may prescribe the persons by whom and the conditions upon which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic, and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication.

The licensee, by accepting a license, and acquiring thereby a privilege from the state to engage in the traffic, a privilege confined to those who are licensees, and withheld from all other citizens, takes it subject to any conditions which the legislature may attach to its exercise. He consents to be bound by the conditions when he accepts the license; and the state is the sole judge of the reasonableness of the conditions imposed. And the power of the legislature, as a part of the excise system, to impose the liabilities imposed by the act in question, upon licensed dealers, as a condition of granting the license, cannot, we think, be questioned.

A party cannot object, upon constitutional grounds, to a liability which he has voluntarily assumed in consideration of a benefit conferred; and one may renounce even a constitutional provision made for his own benefit. The extent to which the legislature has heretofore gone in imposing restrictions or liabilities upon licensees may be seen by reference to the Excise Law of 1857 (chap. 628), many provisions of which are to be found in earlier legislation. Section ten prohibits the sale of liquor on credit to any person other than lodgers, and avoids all securities taken therefor. Section nineteen gives a penalty of fifty dollars to a wife against a dealer in intoxicating liquors, who shall sell or give intoxicating liquor to a husband after complaint made and notice given, as provided by the section, and a like penalty is given under similar circumstances for selling or giving away intoxicating liquors to a wife or minor child. Section twenty-eight contains the germ of the act now under consideration. It provides that any person who shall sell strong or spirituous liquors to any of the individuals to whom it is declared by the act unlawful to make such sales, "shall be liable for all damages which may be sustained in consequence

of such sale," to be recovered by the party sustaining the injury, or by the overseer of the poor for his benefit.

The act of 1873 cannot, however, be sustained, in all its aspects at least, upon the theory that the liability imposed by the act is a condition of a privilege granted by the state. This cannot be affirmed in respect to the liability of the landlord, whose right to lease his property belongs to him as an incident of ownership. The responsibility imposed is not confined to cases of unlawful sales of liquor, or to sales made by licensed vendors. Any person selling or giving away liquor, which causes intoxication and consequent injury, is made liable under the act.

The broad question is presented, whether the act transcends the limits of legislative power in subjecting a landlord to liability, under the circumstances mentioned in the act. Does the act, in effect, deprive him of his property without "due process of law," in the sense of the constitution? If the act can be sustained as to the landlord, it is clearly valid as to all other persons; and its validity as to the landlord is the question directly presented in this case.

We need not enter into any elaborate discussion of the meaning of the words "due process of law." This has been done in numerous judicial decisions. They are held, under the liberal interpretation given them, to protect the life, liberty and property of the citizen against acts of mere arbitrary persons, in any department of the government. DENIO, J., in *Westervelt* v. *Gregg*, 12 N. Y. 212. These are the fundamental civil rights, for the security of which society is organized; and all acts of legislation which contravene them are within the prohibition of the constitutional guaranty. In judicial proceedings, "due process of law" requires notice, hearing and judgment; in legislative proceedings, conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments. It is as difficult as it would be unwise, to attempt an exact definition of their scope. Their application, in a particular case, must be determined when the question arises, and, in the absence of exact precedents courts must determine the question upon a consideration of the general scope of legislative power, the practice of governments, and in view of the conceded principle that individual rights

may be curtailed and limited to secure the public welfare and the equal rights of all.

"Due process of law," in each particular case, means, says Judge COOLEY, "such an exertion of the powers of government as the settled maxims of the law sanction, and under safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

The right of life, liberty or property is not absolute or uncontrollable. The qualification in the Bill of Rights implies that the deprivation of those rights may be due process of law; and governments could not be maintained, in the absence of power somewhere to regulate the relations of individuals to the state, and to each other. Life, liberty or property may be forfeited for cause. Private property may be taken for public use, on condition of compensation, or by taxation, or it may be transferred by judicial process, for the satisfaction of private contracts or as a compensation for private wrongs and injuries.

The purpose of the act in question, as indicated by its title, is the suppression of "intemperance, pauperism and crime." It cannot be denied that these are public purposes within the legitimate scope of legislation, nor can it be doubted by any observing and intelligent person that the use of intoxicating liquors is the fruitful source of many of the evils which afflict society. Pauperism, vice and crime are the usual concomitants of the unrestrained indulgence of the appetite for strong drink. Impoverishment of families, the imposition of public burdens, insecurity of life and property, are consequent upon the prevalence of the great evil of intemperance. If the legislature was impotent to deal with the traffic in intoxicating liquors, or powerless to restrain or regulate it in the interest of the community at large, because legislation on the subject might, to some extent, interfere with the use of property or the prosecution of private business, the legislature would be shorn of one of its most usual and important functions. But, as we have said, the right of the legislature to regulate the traffic is shown by the uniform practice of the government. It may not only regulate, but it may prohibit it. This was declared, after solemn argument and mature deliberation, in one of the propositions adopted by this court in *Wynehamer* v. *The People*, subject only to qualification that the prohibition shall not interfere with vested rights of property. The same principle was declared in the case of *The*

Metropolitan Board of Health v. *Barrie*, 34 N. Y. 657; and that the legislative power extends to the entire prohibition of the traffic has been recently adjudged by the Supreme Court of the United States.

It is quite evident that the Act of 1873 seriously interferes with the profitable use of real property by the owner. This is especially true with respect to a building erected to be occupied as an inn or hotel, and specially adapted to that use, where the rental value may largely depend upon the right of the tenant to sell intoxicating liquors. The owner of such a building may well hesitate to lease his property, when by so doing he subjects himself to the onerous liability imposed by the act. The act, in this way, indirectly operates to restrain the absolute freedom of the owner in the use of his property, and may justly be said to impair its value. But this is not a taking of his property within the meaning of the constitution. He is not deprived either of the title or the possession. The use of his property for any other lawful purpose is unrestricted, and he may let or use it as a place for the sale of liquors, subject to the liability which the act imposes.

The objection we are now considering would apply with greater force to a statute prohibiting, under any circumstances, the traffic in intoxicating liquors, and as such a statute must be conceded to be within the legislative power, and would not interfere with any vested rights of the owner of real property, protected by the constitution, although absolutely preventing the particular use, *a fortiori*, the act in question does not operate as an unlawful restraint upon the use of property.

That a statute impairs the value of property does not make it unconstitutional. All property is held subject to the power of the state to regulate or control its use, to secure the general safety and the public welfare. "We think it a settled principle," says Chief Justice SHAW, in *Commonwealth* v. *Alger*, 7 Cush. 84, "growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare." Judge REDFIELD, in a passage often cited with approval, speaking of

the police power, says: "By this general police power of the state persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was or upon acknowledged general principles can be made:" *Thorpe* v. *Rut. & Burl. Railroad Co.*, 27 Vt. 140. The police power, so called, inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which, in the absence of any controlling, regulating authority, and has been constantly exercised by the legislature in a great variety of cases. We need not enumerate the subjects in relation to which this power has been exercised. We shall content ourselves by referring to two cases, recently decided by the Supreme Court of the United States, to show how far courts have gone in upholding legislation affecting private rights and property, as a due exercise of the police power residing in the state. These cases are *The Slaughter-House Cases*, 16 Wall. 36, and *Munn* v. *The State of Illinois*, 4 Otto 114. The first case involved the question of the validity of a statute of Louisiana, passed in 1869, granting to a corporation, created by the act, the exclusive right for twenty-five years to have and maintain slaughter-houses, landings for cattle, and yards for enclosing cattle intended for sale or slaughter, within the parishes of Orleans, Jefferson and St. Bernard, a territory containing over a thousand square miles, including the city of New Orleans and a population of several hundred thousand persons, and prohibiting all other persons from building, keeping or having slaughter-houses, landings or yards for cattle intended for sale or slaughter, within these limits; and requiring that all cattle and other animals, intended for sale or slaughter within that district, should be brought to the yards and slaughter-houses of the corporation; and, authorizing the corporation to exact certain fees for the use of its wharves, and for each animal slaughtered. It appeared that when the act was passed there were within this territory a thousand or more persons engaged in the preparation and sale of animal food, many of whom owned slaughter-houses and yards for the prosecution of their business. The act was entitled "An act to protect the public health," &c., and the court held it valid as a police regulation. That the act seriously interfered with the prosecution of a lawful business by a large number of people and greatly impaired the value of slaughter-

house property is evident. But the majority of the court were of the opinion that the act was not void, either as creating a monopoly, or as depriving the persons affected by it of their property, within the meaning of the constitution.

In *Munn* v. *The State of Illinois*, the court sustained an act of the legislature of Illinois prescribing a maximum rate of charges for the handling of grain, in warehouses in that state, and requiring warehouses to procure a license, and authorizing its revocation, and prohibiting the carrying on the business of warehousing grain, in any warehouse, without such license, or after its revocation. The act was held to be valid as well as to warehouses built before as to those which might be built after the act was passed. The right of the state to make the regulations contained in the acts was put upon the ground that the subject was one involving the public interest and general welfare. WAITE, Ch. J., in delivering the opinion of the court, said: "When one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

These cases may perhaps be deemed to have carried the right of legislative interference with private rights and property to its utmost limit, but they illustrate the scope of the police power in legislation; and the reports abound in decisions which show that the state has authority to regulate the use and enjoyment of property and the control of private business in many ways, "without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property."

The right of the legislature to control the use and traffic in intoxicating liquors being established, its authority to impose liabilities upon those who exercise the traffic, or who sell or give away intoxicating drinks, for consequential injuries to third persons, follow as a necessary incident; and the Act of 1873 is not invalid, because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offences, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legisla-

ture may impose upon one man liability for an injury suffered by another with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature has done in the Act of 1873. That there is or may be a relation, in the nature of cause and effect, between the act of selling or giving away intoxicating liquors, and the injuries for which a remedy is given, is apparent; and upon this relation the legislature has proceeded in enacting the law in question. It is an extension of the principle expressed in the maxim, "*sic utere tuo, ut alienum non lædas*," to cases to which it had not before been applied; and the propriety of such an application is a legislative and not a judicial question.

It is said that the statute imposes a liability for the consequences of a lawful act. But the legislature, having control of the subject of the traffic and use of intoxicating liquors, may make such regulations to prevent the public evils and private injuries resulting from intoxication as in its judgment are calculated to accomplish this end. It may prohibit the selling or giving away of liquor, or it may, while not interfering with the liberty of sale or use, guard against the dangers of an indiscriminate traffic, and induce caution on the part of those who engage in the business, by subjecting them to liabilities for consequential injuries.

The Act of 1873 does not deprive the seller, who is made liable under the act, of his property, without due process of law. It authorizes it to be appropriated, in the due course of judicial proceedings, for the satisfaction of injuries resulting from intoxication caused by his act. The legislatures have said that the seller may be treated as the author of the injuries, and we think this was within the legislative powers.

The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts committed with the use of the leased property.

In *Dobbins* v. *U. S.*, 6 Otto 395, a distillery had been seized and condemned to be forfeited for the violation by the lessee of certain provisions of the Act of Congress regulating the business of distilling.